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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CURTIS LEE JOHNSON,

Petitioner,

vs.

JAMES SPALDING, DR. ROBERT JONES, THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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Counsel for Petitioner

The petitioner, Curtis Lee Johnson, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 18, 1982 affirming the denial of petitioner's application for a writ of habeas corpus.

QUESTIONS PRESENTED

(1) Does an instruction which requires in part:

> "When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon the defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt."

violate the 14th Amendment Due Process Clause under the standard of Cupp v. Naughten, 414 U.S. 141, (1973) and Engle v. Isaac, ___ U.S. ___, (April 5, 1982)?

(2) Should a District Court reviewing a state criminal conviction under 28 USC 2254

(a) consider a series of trial errors, each one affecting a constitutional right, but no single one amounting to prejudicial error, under a cummulative error standard viewing the trial as a whole or only individually and in isolation?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 669 F.2d 589. The opinion of the United States District Court for the Eastern District of Washington is reported at 510 F. Supp. 164. The opinion of the Court of Appeals, Division III of the State of Washington is reported at 19 Wn.App. 200, 574 P.2d 741 (1978). Copies of each are attached in the appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on February 18, 1982 and this petition for certiorai was filed within 90 days from that date pursuant to Rule 20 of this court. Jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment IV:

...; nor shall any state deprive any person of ..., liberty ..., without due process of law,...

Amendment VI:

In all criminal proceedings, the accused shall enjoy the right...to be confronted with the witnesses against him; ... and to have the assistance of counsel for his defense.

United States Code, Title 28

§2254(a):

...a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Petitioner, a black, older prison inmate in the Washington State Penitentiary in Walla Walla, Washington was tried for the murder of another inmate which occurred on January 7,

1976 (C.P. 1). Petitioner denied that he was the killer and called 24 witnesses who testified that he was not the person who committed the murder. The state called 14 witnesses, 5 of whom (all prisoners) identified the petitioner as the killer. No forensic or corroborative evidence was offered to establish the identity of the killer. The only issue of fact to be resolved by the jury was whether Mr. Johnson was the killer.

The state's case against Mr. Johnson was based entirely on testimonial proof; no physical evidence introduced at trial linked Mr. Johnson to the homicide, or corroborated the testimony of the state's witnesses. Evidence intoduced by both sides during the trial served only to bolster or impeach the credibility of various eyewitnesses and alibi witnesses. Substantial inconsistencies, bias or prejudice existed in the testimony of every key witness for both prosecution and defense.:

Typical Examples of Inconsistencies: Compare testimony of Carr (R.P. 102-03, 104) with testimony of correction officer Brooks (R.P. 67) concerning Carr's activities on January 6; concerning details of basketball game on January 6. Inconsistencies in testimony of Nabors, Bible and Sorrell discussed in text of brief, supra at p. 6.

Typical Examples of Prior Insconsistent Statements: Lloyd admitted making prior statements exculpating Mr. Johnson (R.P. 239, 257-59, see also testimony of D. Coty, R.P. 535); Bible admitted signing notarized statement exculpating Mr. Johnson (R.P. 169-70, 187-89); Haymaker's testimony was inconsistent with testimony at first trial (R.P. 503-04), as was Bible's (R.P. 182) and Lloyd's (R.P. 269-71).

Examples of Bias, Motive, Prejudice: Carr (R. P. 93, 96), Lloyd (R.P. 242-43, 272, 524), Nabors (R.P. 283), Sorrell (R.P. 317, Iverson (R.P. 594), Haymaker (R.P. 486, 492, L. McLaughlin (R.P. 524-25).

Prior Convictions: All the above mentioned witnesses except Brooks.

Mental Incapacity: Nabors, history of mental illness (R.P. 312-13). All witnesses were either inmates in the penitentiary with motives to lie based upon carrying favor with the state or groups within the penitentiary; or were on parole with potential fear of retaliation by either the state or the groups within the penitentiary; or were themselves potential suspects in the homicide.

After deliberation, the jury was unable to agree upon a verdict and a mistrial was declared. On retrial after a change of venue

to the opposite side of the state, the defendant was convicted on virtually an identical trial record.

During the second trial, the jury was instructed in part:

> "A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.
>
> When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt." (See Appendix for full instruction).

The only definition of reasonable doubt given to the jury stated in part:

> "The expression reasonable doubt means in law just what the words imply--a doubt founded on some good reason. It must arise from the evidence or lack of the evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fair-minded man might with reason entertain consistently with a con-

scientious desire to ascertain the truth." (Emphasis added.)(See Appendix for full text.)

In both opening statement and closing argument the prosecutor was allowed to argue that "the defense has the burden of proof to make the state prove its case beyond a reasonable doubt," (RP.1) and that "they [the defense] have the duty to call witnesses" (RP 50).

At the second trial, the defense did not call one of the prisoner witneses who the prosecution had been notified might testify. (Under Washington law, the defense must disclose the identity and expected testimony for all witnesses other than the defendant; see Washington Court Rules Cr R 4.7(b)(1)). Over objection and motion in limine, the prosecution was allowed to argue a "missing witness inference" against petitioner; i.e., that this witness would have disclosed that the alibi was false and that the jury could infer this from the failure of the defendant to call the witness to the stand. The missing witness

was in the custody of the state and available to be called by the state.

Lopez Bible, one of the witnesses who testified for the state in Petitioner's first trial and who had denied being offered consideration for early parole as an inducement to testify, was on parole in California at the time of the second trial. Over objection, his testimony from the first trial was allowed to be read to the jury in lieu of being returned to testify. After petitioner's conviction, Bible returned to Washington and gave an affidavit retracting his earlier testimony and admitting he had been offered a deal to testify in the first trial.

During cross examination of one of the critical prosecution witnesses, Bruce Lloyd, petitioner's counsel attempted to question Lloyd on matters concerning parole violations and other charges and the subsequent reinstatement of parole which were contemporaneous with Lloyd's decision to testify against

petitioner. The purpose of the offered inquiry was to determine the effect the reinstatement of parole and dismissal of an investigation had upon Lloyd's motive to testify as a State's witness (RP 263-65). The state objected to this line of questioning and was sustained. Later, in the defense case, petitioner tried to offer the testimony of Lloyd's wife, Loretta McLaughlin. Mrs. McLaughlin testified in an offer of proof outside the presence of the jury that she and Lloyd were transporting narcotics to the penitentiary when they were arrested and imprisoned for possession of heroin in late March, 1976. (RP 453). Lloyd posted bond and went to Seattle, where he obtained $1,500.00 from Mr. Johnson's fiance, Veryl Yarnes, by representing to her that the money would be used to bribe a prosecutor in Walla Walla "to get Curtis off." (RP 453). The $1,500.00 was actually used to post bond obtaining Mrs. McLaughlin's release from jail (RP 454). The two then fled the state and

traveled to California, where Lloyd supported himself for two months by selling heroin (RP 455-56). Two weeks after they arrived in California, Lloyd told Mrs. McLaughlin that he was the murderer and not Petitioner. (RP 455). At this time Lloyd and Mrs. McLaughlin were joint fugitives and co-conspirators in several criminal activities. Ultimately, the jury was only allowed to hear the testimony of Mrs. McLaughlin concerning Lloyd's admission to the crime (RP 522-26) which was severely limited in scope. The rest of her testimony was ruled irrelevant even though it clearly showed a motive and interest on the part of Lloyd.

At the second trial, all of the prosecution witnesses who were prisoners testified in civilian clothes while all of petitioner's witnesses testified in prison issue clothing.

Petitioner was convicted of murder 1° and sentenced to life in prison.

Each of the above issues was raised, argued and reached on direct appeal to the

Washington Court of Appeals Div. III; review denied, Washington Supreme Court October 6, 1978, see opinion in appendix. Each was again raised before the District Court for the Eastern District of Washington by writ of habeas corpus, see opinion in appendix; and before the Ninth Circuit Court of Appeals; see opinion attached. Jurisdiction in the original federal proceeding in the District Court was based upon 28 USC §2241(d) and 28 USC §2254(a) see opinion p. 2 attached in appendix. Petitioner argued that he was denied due process of law, confrontation, and effective assistance of counsel under the 14th amendment due process clause and the incorporated 6th amendment guarantees. Petitioner argued that each of these issues was of constitutional magnitude and that collectively he had been denied a fundamentally fair trial.

ARGUMENT

(1) THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE

SETTLED BY THIS COURT AND WHICH HAS SPLIT THE LOWER COURTS:

This court has never decided on the merits whether an alibi instruction which shifts the burden of proof to a defendant as does instruction #13 set out in the appendix violates the due process clause of the Fourteenth Amendment by removing the burden of proof from the prosectuion on "a fact necessary to constitute the crime with which he is charged," In re Winship, 397 U.S. 258 (1970). See also Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

Alibi is not an affirmative defense but is a denial of each and every element of the crime with which defendant is charged and which the state must prove beyond a reasonable doubt. The Patterson majority stated,

> "We will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which

the defendant is charged," Patterson v. New York, 432 U.S. 197, 210."

"Accordingly, while a state may place upon defendant the burden of proving facts supporting an affirmative defense in justification of a crime, a state could not classify an alibi as an affirmative defense and place the burden of proof on the defendant because an alibi is really another way of denying guilt." Rogers v. Redman, 457 F. Supp 929, 932 (D.C. Del. 1978).

In Rogers v. Redman the petitioner brought a habeas petition challenging an alibi instruction similar to the charge in issue here. The district court following the test as dictated in Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed 2d 368; "whether the ailing instruction by itself so infected the entire trial so that the resulting conviction violates due process." That court held that in view of directly conflicting evidence at trial, although it included strong evidence

on behalf of the government, the error in the instructions which contained legally correct instructions but also directly and in unmistakable terms obliged the defendant to prove his alibi, was not harmless error.

> "If there was a reasonable doubt as to whether the petitioner was present at the time and place the alleged offenses were committed, the jury had to find the petitioner not guilty. It is the burden of the state to prove beyond a reasonable doubt that the alibi offered is not true. (3rd Cir. 1971) cert. denied, 414 U.S. 820, 94 S.Ct. 45, 38 L.Ed 2d 52 (1973)."

Rogers v. Redman, supra 933.

An instruction shifting the burden of proof on an alibi issue also violates the defendant's corollary right to a presumption of innocence:

> "By shifting the burden of proof to a person who claims to have been elsewhere at the time of the crime, there is created an irrational and arbitrary presumption of guilt. It arises not by reason of a proof of fact from which a fair inference might be drawn, but from the mere happening that the defendant offers testimony in an

> attempt to establish innocence. When this occurs, unless the defendant can succeed in over-balancing the state's evidence, the jury is expressly told he cannot be acquired by reason of his sole claim to innocence. There is thus a prejudgment of a conclusion which the jury should reach of its own volition.*** [T]his presumption would conflict with the over-riding presumption of innocence with which the law endows the accused and which extends to every element of the crime."

United States v. Beedle, 463 F.2d 721, 724 (3d Cir. 1972), quoting Stumpf v. Bennett, 398 F.2d 111, 116 (8th Cir. 1968), cert. denied. 393 U.S. 18, 89 S.Ct. 483, 21 L.Ed 2d 466 (1969). Although the Third Circuit did not reach the constitutional issue in Beedle, subsequent decisions of this Court have held that the presumption of innocence is a constitutionally protected right. See Cool v. United States, 409 U.S. 104, 93 S.Ct. 354, 34 L. Ed 2d 335; Cupp v. Naughten, supra, 414 U.S. at 149-50, 94 S.Ct. 396.

The alibi instruction in Mr. Johnson's trial was also defective in that it not only put the burden of proof on petitioner as to alibi but further charged the jury to consider all the evidence including that of alibi, in determining the guilt of the defendant beyond a reasonable doubt ..., therefore, the jury had a "choice" of applying the two conflicting burdens of proof. A jury may not, however, have such an option to ignore the reasonable doubt test on the issue of identity in a criminal prosecution. "The constitution and more specifically the due process clause of the fourteenth amendment, permits of no such choice." Smith v. Smith, 454 F.2d 572, 578 (5th Cir. 1971).

See also Stumpf v. Bennett, 398 F.2d 111 (8th Cir. en banc 1968); Wright v. Smith 569 F.2d 1188, (2nd Cir. 1978); Thomas v. U.S. 213 F.2d 30 (9th Cir. 1954); Graham v. Maryland, 454 F.Supp 643 (D. Md. 1978); Thorton v. Stynchcombe, 481 F.2d 1175 (5th Cir. 1973);

U.S. v. Alston, 551 F.2d 315 (D.C. Cir. 1976); U.S. v. Booz, 451 F.2d 719 (3d Cir. 1971); U.S. U.S. v. Beedle, 463 F.2d 721 (3rd Cir. 1973); and Smith v. Smith, 464 F.2d (5th Cir. 1972).

Despite the extensive history of lower court consideration of the due process implications of an alibi instruction, this court has never resolved the issue. Since the court decided Cupp v. Naughten, supra, the lower courtshave split see e.g., Rogers v. Redman, supra, and the instant case. These conflicts and the important and recurring nature of the issues justify the grant of certiorari.

(2) THE DECISION BELOW RAISES RECURRENT AND SIGNIFICANT PROBLEMS OF THE PROPER SCOPE OF REVIEW UNDER 28 USC 2254(1).

This court, beginning with Wainright v. Sykes, 433 U.S. 72 (1977), Cupp v. Naughten, supra, Henderson v. Kibbe, 431 U.S. 145 (1977), 431 U.S 145 (1977), and more recently in Rose v. Lundy, 102 S.Ct. 1198 (1982) and Engle v. Isaac, supra, has attempted to clarify the

scope of review of a state court conviction in federal habeas corpus. One substantial and recurrent problem has not yet been considered by this court: where several errors occurred at trial, each properly preserved for federal review (Wainright v. Sykes, supra), and where each of the errors affects a federal constitutional guarantee; but where each error may singly be lacking in prejudice, should a district court consider the cumulative effect of the errors?

In Cupp v. Naughten, supra 146-147, and Henderson v. Kibbe, supra 154, this court stated that

> "a single instruction to a jury may not be judged in isolation, but must be viewed in the context of the overall charge."

The Ninth Circuit affirmed the district court in refusing to review the instruction errors claimed in the full context of the case but instead viewed them each in isolation. The essence of petitioner's claim

was that he had been "the victim of a fundamental miscarriage of justice... "Engle v. Isaacs, supra, because the cumulative effect of each instruction argument and evidentiary error, collectively, denied him a fair trial. The reviewing court below isolated each claimed error and analyzed it assuming each error was the only one. No collective effect to establish the "cause and prejudice" standard of Engle v. Isaacs, supra was done.

In this case petitioner showed the following errors affecting the burden of proof which had constitutional effect:

(1) The burden of proof on alibi--see discussion part (1) supra.;

(2) A misstatement of the definition of reasonable doubt as substantial doubt is the only explanation of reasonable doubt given to the jury; see U.S. v. Athens, 487 F.2d 257 (8th Cir. 1970); Dunn v. Perrin, 570 F. 2d 21, 25, (1st Cir. 1978), U.S. v. Rodriguez

585 F.2d 1234, 1241-42 (5th Cir. 1978), U.S. v. Muckenstraum, 515 F.2d 568, 570-71 (5th Cir. 1975), Young v. Wyrick, 451 F.Supp. 576, 583-84 (W.D. Mo. 1978), U.S. v. Shaffner, 525 F.2d 1021 (7th Cir. 1975), U.S. v. Gratton, 525 F.2d 1161, 1162 (7th Cir. 1976), U.S. v. Crouch, 528 F.2d 625, 630 (7th Cir. 1976), U.S. v. Flannery, 451 F.2d 880, 881-82 (1st Cir. 1971). See also Taylor v. Kentucky, 436 U.S. 478, 488 (1978).

(3) A missing witness inference was allowed to be drawn against petitioner because he failed to call one prisoner witness out of 24 possible witnesses he was compelled to notify the prosecution might testify although that witness was available to the prosecution and in their custody. The prosecutor stated:

> "In trying a case, the state can call witnesses. The defense has that same right. They have the duty to call witnesses. It was very interesting in this trial there is another man that was there, by their own witnesses, Leo the Bandido Larson. He was there the night before. He was there that next morning. His name

> appeared. Mr. Schacht called the witness Wednesday. We were served a witness list. We have to exchange witness lists under the requirements. We were served a witness list with the name of Leo Larson who we referred to as Leo the Bandido. He did not appear here. He was an eyewitness. He was a witness that the defense had." (RP 50-51 emphasis added).

See Wynn v. U.S., 397 F.2d 621, 625, fn. 23, (D.C. Cir. 1967), Combs v. U.S., 399 A.2d 1313, (D.C. App. 1979), U.S. v. Graves, 150 U.S. 118, 14 S.Ct. 40, L.Ed. (1893), U.S. v. Busic,587 F.2d 23, 25-26 (1st Cir. 1964)., U.S. v. Young, 463 F.2d 934, 940 (D.C. Cir. 1972).

These three errors, all raising constitutional questions of due process by shifting the burden of proof and confusing the standard of proof for the jury raise the "fundamental miscarriage of justice" standard of Wainwright v. Sykes, supra, and Engles v. Isaacs, supra, when viewed collectively which the District Court refused to do. Opinion pp. 7-8.

Similarly, petitioner's other claimed errors affected his right to confront and properly present evidence of his innocence and were a further compounding of the effect of the first three errors, supra.

(4) The restrictions on cross examination and extrinsic impeachment of one of the key prosecution witnesses, Bruce Lloyd, see Davis v. Alaska, 415 U.S. 308 at 318 (1974); Patterson v. McCarthy, 581 F.2d 220 (9th Cir. 1978); U.S. v. Mayer, 556 F.2d 245 (5th Cir. 1977); Annuziato v. Munson, 566 F.2d 410 (2d Cir. 1977); Alford v. U.S., 282 U.S. 687 (1931) U.S. v. Mayer, 556 F.2d 245 (5th Cir. 1977) and U.S. v. Ouori, 535 F.2d 938 (1976).

The trial court's ruling did not allow "the maximum opportunity to test the credibility of the government's witness," United States v. Rodriguez, 439 F.2d 782, 783 (9th Cir. 1971). This affirmative and necessary testimony should have been allowed, Greatreaks v. United States, 211 F.2d 674 at 676 (9th

Cir. 1963) and United States v. Blackwood, 456 F.2d 526, 530 (2d Cir. 1972), cert. den. 409 U.S. 863.

(5) The denial of confrontation of another of the prosecution witnesses, Lopez Bible, by allowing his previous testimony to be read without an adequate showing of necessity. After trial Bible admitted that he had been offered a deal to testify which he had denied at his first appearance. These facts which would have been elicited on cross examination had he been put on the stand and were critical in showing the bias and interest of other state witnesses who identified the defendant. See cases cited in (4) supra; Barber v. Page, 390 U.S. 719, (1968); and Pointer v. Texas, 380 U.S. 400 (1963).

(6) Similarly, the last of petitioner's errors was the lack of effective assistance of counsel by his trial lawyer to offer his alibi witnesses' testimony in a credible manner by calling the witneses to the stand

in prison uniforms while the state witnesses were not similarly clad. Similarly, his trial counsel failed to even research or know the law of alibi in presenting his case to the jury. (See affidavit of counsel in appendix). Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. en banc, 1978) and U.S. v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976).

Petitioner argued to the District Court that the combined effects of the above claimed errors collectively created a denial of due process. The district court's rejection of this argument ignores the dictates of Winship supra, and other controlling authority.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 580 (1979) the court quoting Winship said:

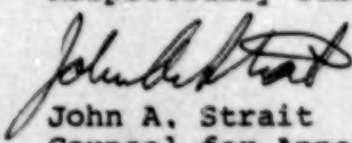
"The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the

facts of the case." Id. at 317-17

"A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court. For example, on direct review of a state court conviction, where the claim is made that an involuntary confession was used against the defendant, this court reviews the facts to determine whether the confession was wrongly admitted into evidence. [citations]. The same duty obtains in federal habeas corpus proceedings. Townsend v. Sain, 372 U.S. 293, 318, U.S. 443, 506-07, 73 S.Ct. 397, 97 L.Ed 469 (19).

This issue of the effect of cumulative constitutional error justifies the grant of a writ of certiorari to review the judgment below.

Respectfully submitted,



John A. Strait
Counsel for Appellant

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

CURTIS LEE JOHNSON,

Petitioner,

vs.

JAMES SPALDING, DR. ROBERT JONES, THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CURTIS LEE JOHNSON,
Petitioner-Appellant,

v.

JAMES SPALDING, DR. ROBERT JONES, THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON,
Respondents-Appellees.

NO. 81-3205

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted Jan. 5, 1982.

Decided Feb. 18. 1982.

The United States District Court for the Eastern District of Washington, Justin L. Quackenbush, J., 510 F.Supp. 164, denied habeas corpus relief, and petitioner appealed. The Court of Appeals, Kilkenny, Circuit Judge, held that there was no real possibility that jury was actually misled or that petitioner was in any way prejudiced by alleged errors he raised on appeal.

Affirmed.

Habeas Corpus 25.1(4)

Petitioner, a Washington state prisoner who was convicted of first-degree murder, had

fair trial and there was no real possibility that jury was actually misled or that he was in any way prejudiced by alleged errors, and thus petitioner, who argued that alibi instruction shifted state's burden of persuasion to him, that instruction on reasonable doubt overstated uncertainty required for reasonable doubt, and that district court made several erroneous evidentiary rulings that violated his due process rights, was not entitled to habeas corpus relief. 28 U.S.C.A. § 2254; U.S.C.A.Const. Amend. 5.

John A. Strait, Tacoma, Wash. for petitioner-appellant.

Mike Lynch, Asst. Atty. Gen., Olympia, Wash., for respondents-appellees.

Appeal from the United States District Court Eastern District of Washington.

Before KILKENNY, ANDERSON and ALARCON, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant, a Washington state prisoner,

convicted of first degree murder, convicted of first degree murder, sought habeas corpus relief under 28 U.S.C. § 2254. In an exceptionally well written and exhaustive order, the district court denied the petition. Johnson v. Spalding, 510 F.Supp. 164 (ED Wash. 1981).

Here, as in the district court, the appellant challenges the validity of the state court conviction on the following grounds:

(1) that the alibi instruction shifted to him the state's burden of persuasion;

(2) that the instruction on reasonable doubt overstated the uncertainty required for a reasonable doubt;

(3) that an adverse missing witness inference argued by the prosecution prevented him from having a fair trial;

(4) that the admission of prior trial testimony of an unavailable state's witness violated his right to confrontation;

(5) that a limitation upon the scope of impeachment testimony violated his right to confrontation and cross-examination;

(6) that the admission of portions of a letter to show appellant's hostility to the prosecutor biased the jury against him, and

(7) that his right to effective assistance of counsel was denied.

Additionally, appellant claims that the district court order is based upon erroneous case analysis and that it made several erroneous evidentiary rulings that individually and collectively violate the appellant's due process rights.

Despite the arguments and case citations in appellant's 46-page opening brief, with appendix, and his 9-page reply brief, our review of the complete record before us, including that of the state court, convinces us that the district court correctly interpreted and properly applied the law to the record. Beyond question, the appellant had a fair trial and we see no real possibility that the jury was actually misled or that appellant was in any way prejudiced by the alleged errors raised on this appeal. Appellant's substantial

rights were in no way affected. Because appellant's assignments of error are to all intents and purposes identical with those raised in the district court, and by reason of our review of the record, we have no hesitancy in affirming that court's order for the reasons stated in its order, supra.

IT IS SO ORDERED.

CURTIS LEE JOHNSON, Petitioner,

v.

JAMES SPAULDING, Respondent.

No. C-80-479.

United States District Court,

E. D. Washington.

March 19, 1981.

Petitioner sought writ of habeas corpus. The District Court, Quackenbush, J., held that: (1) alibi instruction given at petitioner's state murder prosecution did not unconstitutionally remove prosecution's burden to prove evidence and persuade jury as to essential elements of the crime; (2) giving of instruction concerning reasonable doubt did not raise issue of constitutional dimensions; (3) cumulative allegations of nonconstitutional "error" could not be considered; (4) petitioner was not denied his right to confront witnesses; and (5) petitioner failed to establish that he was denied his right to the effective assistance of counsel.

Petition denied.

John A. Strait, Criminal Appellate Clinic, University of Puget Sound School of Law, Tacoma, Wash., for petitioner Curtis Lee Johnson.

Michael P. Lynch, Asst. Atty. Gen., Olympia Wash., for respondent Superintendent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

QUACKENBUSH, District Judge.

Petitioner seeks a writ of habeas corpus. He is confined as a result of a conviction for first degree murder. He challenges that confinement alleging: (1) an alibi instruction shifted the state's burden of persuasion onto him; (2) the reasonable doubt instruction overstated the uncertainty required for a reasonable doubt; (3) an adverse missing witness inference prejudiced a fair trial; (4) the admission of prior trial testimony of an unavailable state's witness violated the right to confrontation; (5) a limitation upon the scope of impeachment testimony violated the right to confrontation and cross-examiantion;

(6) the admission of a letter to show hostility to the prosecutor biased the jury; and (7) his right to effective assistance of counsel was denied.

Petitioner was charged in Walla Walla County Washington Superior Court with the first degree murder on January 7, 1976 of a prisoner inmate. At trial Petitioner testifed and produced witnesses to support his alibi defense. A deadlocked jury and extensive media coverage necessitated a second trial with venue in Snohomish County. The second jury found Petitioner guilty. Petitioner returned to Walla Walla County for pronouncement of a life imprisonment sentence.

Division III of the State of Washington Court of Appeals reviewed the same errors as alleged in this Court, affirming the conviction. Its opinion is published in part at State v. Johnson, 19 Wash.App. 200, 574 P.2d 741 (1978). The Washington Supreme Court refused a discretionary review. Subsequently,

Petitioner instituted this collateral attack upon his confinement as allegedly imposed contrary to the United States Constitution.

[1] There was some initial concern with the propriety of our jurisdiction to entertain Petitioner's application for a writ. Jurisdiction is limited by 28 U.S.C. §2241(d) which permits an application to be filed "in the district court for the district wherein such person is in custody or ... the district within which the State Court was held which convicted and sentenced" the petitioner. Petitioner filed his application for the writ while in Shelton State Reformatory within the territorial reach of the federal court for the western district of Washington,[1] thus our

1. Counsel informed the Court that Petitioner was only temporarily at Shelton. His belongings were in the penitentiary at Walla Walla, in this Court's geographic jurisdiction. Petitioner was then moved out of the state and subsequently returned to Walla Walla at the time of argument in this Court.

concern for jurisdiction under the "in custody" requirement. However, the jurisdictional basis under the criteria of this court's jurisdiction over the proceedings of the court "which convicted and sentenced" is considerably stronger.

Following his trial in the County of Snohomish, Petitioner and the full record of his case were returned to the control of Walla Walla County Superior Court within this district. It appears that the ministerial act of entering the judgment of conviction occurred in Walla Walla County Cause No. 66747. Post trial motions, sentencing, and the commitment occurred in Walla Walla County. We understand that a Washington conviction may mean a "formal finding or declaration of guilt--as in a judgment and sentence". State ex rel. Brown v. Superior Court, 79 Wash. 570, 140 P. 555 (1914). These facts would satisfy the "convicted and sentence" language of the statute, §2241(d). Therefore, this Court is satisfied

that it has jurisdiction.

[2] The Court is also satisfied that exhaustion doctrine would allow Petitioner to proceed in this Court, notwithstanding a remedy available to petitioner in the State Court through the vehicle of a personal restraint petitioner. The Washington Rules of Appelate Procedure (RAP) establish the personal restraint petitioner as the only procedure for post-conviction relief originating in the appellate courts. RAP 16.3. The issues raised by the habeas corpus petition were previously and "fairly presented" to the Division III Court of Appeals, similarly constituted, to which the state personal restraint petition would be directed. RAP 16.3(c), 16.8(b). The decision of that court is subject to discretionary review by the State Supreme Court "on the terms and in the manner" as governed the petition for review of the direct appeal. RAP 16.14(c). We perceive that any effort to exhaust state remedies clearly would be

futile and that is not required. Blackledge v. Perry, 417 U.S. 21, 24, 94 S.Ct. 2098, 2100, 40 L.Ed.2d 628 (1974). We proceed seriatim to treat the allegations that Peitioner "is in custody in violation of the Constitution of the United States. 28 U.S.C. § 2254(a).

[3] The Court recognizes that the Constitution must not be lightly construed "so as to intrude upon the administration of justice by the individual states" and, that "among other things it is normally 'within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Patterson v. New York, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977). However, if the alibi

instruction[2] required the defendant to produce evidence and convince the jury as to his innocence of the elements of the crime, the instruction would offend the presumption of innocence[3] "ranked as fundamental". This Court would intervene in such a case to overturn the

2. "A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.
When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.
After both the State and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, if not, you should convict."

3. The presumption of innocence is a shorthand description of the right of the accused to "remain inactive and secure" until the prosecution has taken up its burden to produce evidence and to persuade or convince the jury beyong a reasonable doubt. Taylor v. Kentucky 436 U.S. 478, 483 n. 12, 98 S.Ct. 1930, 1934 n. 12, 56 L.Ed. 2d 468 (1978).

state court's verdict. Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

[4] Petitioner argues that the alibi instruction given at trial removed the prosecution's burden to produce evidence and persuade the jury as to the essential elements of crime and placed that requirement upon him. To assess this contention, the Court must look to all of the instructions and not to an isolated word or sentence. Cupp v. Naughten, supra, 146-47, 94 S.Ct. at 400.

[5] An alibi defense is the presentation of evidence in an attempt to refute the state's evidence concerning an essential element--the defendant's presence. The challenged instruction states the law of the "defense of alibi" as rule affecting the evidentiary and procedural order of proof. The instruction does not compel the jury to first believe the state's evidence. It does not operate in effect to tell the jury "before you can acquit

the defendant by reason of his defense of alibi, you must find that he has established it (by some evidentiary measure)", Stump v. Bennett, 398 F.2d 111, 119 n.6 (8th Cir. 1968)(en banc).

The contested second paragraph of the instruction begins with the placing of burden of production and persuasion upon the state. The relevant language of the instruction is: "when the state makes out such a case as would sustain a verdict of guilty". The instruction then describes the defendant's presentation as to his theory of the case to refute the state's case. However, the language does not requre the jury to believe the prosecutor's theory until it is satisfied with the defendant's theory. The continuing notion that the prosecution must prove the elements is not interrupted by language of incumbency, requirement, or similar compulsion such that defendant's failure to do as required accrues to the prosecution's benefit. The pertinent language is as follows: "and

the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned". What verges on a burden in this language draws the jurors' attention to the question of whether defendant produced sufficient evidence to put the particularfact of his presence in issue but defendant need not to anything--neither produce nor persuade the mind of the jury. Admittedly, the instruction may create confusion or ambiguity but that is dispelled immediately in the closing paragraph.

On balance, the instruction and the charge as a whole made the jurors' duty clear. The sum of the instruction is that, even if the jury should determine that the defendant presented insufficient evidence of alibi (the alibi evidence in this case was substantial) or should disbelieve the evidence, the jury must weigh all the evidence submitted and should acquit if there is a reasonable doubt of guilt. Furthermore, the charge requires

the state, not the defendant, to meet the resonable doubt standard to convince the jurors of the defendant's presence and guilt of the crime. The Court Concludes that the alibi instruction by its language neither shifts the burden of proof nor negates the explicit presumption of innocence charged by Instruction No. 11. The giving of the instruction did not offend the Constitution.[4]

4. Petitioner cites the case of Kubicek v. May, No. 438-73 C2 (W.D.Wa.1973) (unreported habeas corpus case companion to State v. Kubicek, 81 Wash.2d 497, 502 P.2d 1190; petition granted on grounds that alibi instruction was fundamentally unfair) as support for distinquishing between the alibi instruction in State v. Adams, 81 Wash.2d 468, 503 P.2d 111 (1972) which Petitioner accepts as not containing burden shifting language, and the alibi instruction in this case. However, the instruction in Kubicek's case contained language of "incumbenby". It placed the burden of proof upon the accused to prove something and further required defendant to satisfy the jury. On the other hand, the instruction in this case is identical in operational effect to the State v. Adams type instruction. The only linquistic difference is in use of "to make out" in Adams and the use of "to prove" in this instant instruction. This type instruction was challenged in Poole v. State, 551 F.2d 683 (5th Cir.1977) with the panel holding the instruction did not deny due process, affirming the denial of the writ. Furthermore, a panel of this circuit in Adams v. Raines, No. 74-1848

[6,7] Petitioner alleges that the giving of Instruction 14[5] equated reasonable doubt with substantial doubt thereby overstating the degree of uncertainty required for acquittal. Petitioner provides no authority to support the contention that giving this instruction violates the Constitution. Petitioner's support lies mainly in direct appeal cases, not collateral attacks on state court convictions. In habeas proceedings Petitioner must go further than showing error or even plaine error.

(Dec. 3 1974)(unpublished but argued by the parties) held the instruction was not constitutionally infirm. In United States v. Robinson 602 F.2d 760 (6th Cir. 1979) the Court held on direct appeal that reversal for the giving of a similar type instruction was not required; burden of proof not placed upon defendant.

5. Instruction 14 in pertinent part reads as follows: The expression "reasonable doubt" means in law just what the words imply--a doubt founded on some good reason. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fairminded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

He must show plain constitutional error which prejudiced his fundamental right to a fair trial. See, Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). The giving of this instruction does not raise an issue of constitutional dimensions.

[8] As stated above, an isolated word or sentence in an instruction must not control the Court's decision; rather, the Court must look to the whole charge. A reasonable doubt instruction may stand as a whole even if one part of the instruction is misleading. Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954). In this instance the language of the instruction, viewed in its entirety did not equate reasonable with substantial doubt. United States v. Loman, 551 F.2d 164, 167 (7th Cir. 1976) cert. denied 433 U.S. 912, 97 S.Ct. 2982, 53 L.Ed.2d 1097 (1977), citing United States v. Lawson, 507 F.2d 433 (7th Cir. 1974)(definition of reasonable coubt as "a doubt that is based on reason

and must be substantial rather than speculative" is based on acceptable authority; Id., 440-41). See also, Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 36 L.Ed.2d 468 (1978) (apparently did not find the equation of reasonable doubt with substantial doubt to be offensive).

This instruction, unlike the instruction in Dunn v. Perrin, 570 F.2d 21, 23-4 (1st Cir. 1978), the sole habeas case relied upon by Petitioner, clearly defines reasonable doubt in the context of the burden upon the state to prove every material fact "beyond a reasonable doubt". The total effect of the instruction is that the jury was made to understand that they must feel sure of defendant's guilt and that the onus was on the prosecution and not the defense.

[9] Petitioner, in connection with the two challenged instructions and other asserted evidentiary errors, argues that we should gather any non-constitutional "errors" to-

gether to find that two or more of them constituted the denial of a fundamentally fair trial. This argument, however, is unacceptable. This Court does not have the reviewing authority of an appellate court. Only constitutional error is cognizable here. Donnelly v. DeChristofor, 416 U.S. 637, 642-43, 94 S. Ct. 1868, 1871, 40 L.Ed.2d. 431 (1974); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976); Wainwright v. Sykes, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977). An allegation of error not of constitutional proportions is, for habeas corpus purposes, foreclosed from further consideration except as it constitutes a fact of trial connected to the determination of prejudice after a determined constitutional error. [10] Each allegation of instructional error is tested in the context of the entire charge. State evidentiary rulings are not cognizable unless they involve a "federally significant external event." Crisafi v. Oliver, 396 F.

2d 167 (1968). Certainly, trial errors which infringe upon a specific constitutional protection or oare themselves so prejudicial as to amount to denial of due process, present a justiciable federal issue in a habeas proceeding. Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979). But this Court is without authority to accept Petitioner's invitation to consider cumulative allegations of "error". 28 U.S.C. § 2254(a), and therefore declines it. See, Hammond v. United States, 356 F.2d 931 (9th Cir. 1966)(any number of "almost errors", if not "errors" cannot constitute error; on direct review refusal to stack.)

[11,12] Petitioner next alleges a series of erroneous evidentiary rulings. First, he contends that permitting the prosection's missing witness inference at closing argument rendered the trial fundamentally unfair. The trial judge in advance, over counsel's objection, ruled the adverse inference proper. Defense counsel had an opportunity to rebut

the inference at argument by explaining the absence of the witness--Leo Larsen. However, comment about the failure of the defense to call a witness, even though he is present in court, is not constitutional error. See, U.S. v. Welp, 446 F.2d 867 (9th Cir. 1971). The issue rises to the level of fundamental, however, where the inference is phrased to call attention to the defendant's own failure to testify. United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980). Obviously, the statement of the prosecutor cannot be construed as comment on Petitioner's failure to testify. Petitioner testified. Nor did the statement alter the burden of proof. See United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976).

[13,14] Next, Petitioner alleges that the prosecution was permitted to read Lopez Bible's testimony from the first trial into evidence at the second trial. RP 215-20. He claims this denied his right to confronta-

tion. Lopez Bible, at the time of the second trial, was at an undetermined location in California which made his unavilable without fault of the state. His prior testimony was given under circumstances which provided substantial compliance with the purposes behind the confrontation requirement. See, California v. Green, 399 U.S. 149, 165--66, 90 S.Ct. 1930, 1938--39, 26 L.Ed.2d 489 (1970); Mancusi v. Stubbs, 408 U.S. 204, 215, 92 S.Ct. 2308, 2314, 33 L.Ed.2d 293 (1972). Petitioner had an effective opportunity to confront the witness at the first trial and his Sixth Amendment rights were not deprived by the admitted testimony. Moreover, assuming a Sixth Amendment problem, Bible's testimony, dealing as it did with the transportation of the victim's body from one location to another is of such dubious relevancy that its admission was not prejudicial.

[15-17] Petitioner claims that the restrictions imposed upon the scope of cross-

examination and impeachment of state's witness Bruce Lloyd violated his Sixth Amendment rights. However, the State Court of Appeals found, and the record substantiates their finding, that the facts sought to be introduced about the parole resinstatement of Bruce Lloyd (motive for testifying) and the facts of a prior inconsistent statement of this witness, offered through the impeachment testimony of defense witness Loretta McLaughlin--did come before the jury. RP 242-243; 367-69; 445-48; 454-56; 535-57. The relevant factors concerning Lloyd's motives and his prior inconsistent statements were revealed during the course of the trial. The test as to whether a trial court's ruling violated the Sixth Amendment is "whether the jury had in its possession sufficient information to appraise the biases and motivation of the witness." U.S. v. Bleckner, 501 F.2d 382 (9th. Cir. 1979). The Court admitted sufficient information. Beyond that the Court has broad discretion

concerning the extent of cross-examination. See, e.g., Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir. 1977), cert. denied, 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed.2d 392 (1978). The confrontation clause applies to the essentials of cross-examination not to all the details of its implementation. In this case the substance of Petitioner's Sixth Amendment right was not violated.

[18] Petitioner also contends that the Trial Court's allowing into evidence a portion of a letter sent to the prosecutor, RP--561, biased the jury. But, this contention raises no "federally significant external event"; it implicates no specific guarantee or fundamental right. This evidentiary ruling is not cognizable in a habeas corpus action. Oliphant v. Koehler, 594 F.2d 547, 555 (6th Cir. 1979).

[19] Lastly, Petitioner complains that he was denied his Sixth Amendment right to the assistance of effective counsel. His

claim of ineffective assistance is founded upon the specific assertions that (1) defense counsel(s) failed to know the current status of the alibi instruction law and (2) permitted defense witnesses to appear in prison clothes during a trial where credibility was crucial.

The standard for evaluating this claim of ineffective assistance is set forth in the en banc decision in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793. The circuit held that persons accused of crime must be afforded reasonably competent and effective representation but, where the claim of ineffective assistance if founded upon specific acts or omissions of defense counsel at trial, the accused must establish that counsel's errors prejudiced the defense. Id., 1338, 1341. Applying this standard to the alleged errors convinces the Court that Petitioner was competently represented.

The Supreme Court of Washington in State

v. Adams, supra, stated that the alibi instruction substantially as given in this case was the "approved and accepted" formulation but advised against giving any alibi instruction. Id., 478, 503 P.2d 111. As best as may be determined the instruction was selected by the court, although without noticeable objection of counsel. However, this Court found above that the giving of the instruction did not render the trial fundamentally unfair. In the circumstances of a case where alibi is the theory of defense supported by substantial alibi testimony, it may be tactically sound judgment to request an alibi instruction to assist the jury. The failure to object to this instruction neither indicates a failure to understand the law nor prejudices the defense.

The particular due process right implicated by an appearance at trial in prison issue clothes is the presumption of innocence. Thus, the Fourteenth Amendment protects

against the State compelling an accused to stand trial while dressed in prison clothes. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In this instance, defendant's witnesses, not defendant, appeared in prison clothes. But with or without prison clothes, there was never a question in the jury's mind that these witnesses were inmates of the Washington State Penitentiary. Petitioner makes no allegation that the state compelled their appearance in prison clothes but, had it done so, we would be at a loss to find what prejudice resulted. The tactical decision to present witnesses in prison clothing did not prejudice the defense.

In conclusion, the Court holds that the fundamental rights of due process secured by the Fourteenth Amendment were substantially afforded at trial. The Court is, therefore without grounds upon which to grant the Writ of Habeas Corpus. Consequently, the Petition is DENIED.

IT IS SO ORDERED.

[No. 2139-3. Division Three. January 31, 1978.]

THE STATE OF WASHINGTON, *Respondent*, v. CURTIS LEE JOHNSON, *Appellant*.

[1] **Criminal Law — Alibi — Burden of Proof — In General.** The prosecution's ultimate burden of proving beyond a reasonable doubt that an accused committed the charged crime is not reduced by a defendant's assertion of an alibi.

[2] **Criminal Law — Alibi — Burden of Proof — Instructions.** Although it is error to instruct that alibi is a "defense" and that the defendant has the burden of proving an alibi, such an instruction does not constitute reversible error unless it results in prejudice to the defendant.

Nature of Action: Prosecution for first-degree murder of an inmate at the state penitentiary.

Superior Court: The Superior Court for Walla Walla County, No. 66747, Edward M. Nollmeyer, J. Pro Tem., on October 15, 1976, entered a judgment of guilty.

Court of Appeals: Holding that the giving of an alibi instruction was not reversible error, the court *affirms* the judgment.

John A. Strait, for appellant.

Arthur R. Eggers, Prosecuting Attorney, and *Jerry A. Votendahl, Special Deputy*, for respondent.

McINTURFF, J.—Curtis Lee Johnson appeals from a first-degree murder conviction arising out of a stabbing in a breezeway at the state penitentiary. His defense was an alibi—that he was in the prison cafeteria at the time of the incident.

Mr. Johnson presents nine assignments of error, but his principle contentions concern the advisability of giving an alibi instruction. The court instructed the jury:

> A defense interposed by the defendant in this case is an alibi; that is, the defendant was at another place at the identical time the crime was committed.

When the State makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon said defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.

After both the State and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, if not, you should convict.

Mr. Johnson attacks the instruction on three fronts: (1) Preexisting case law forbids giving an alibi instruction; (2) the instruction does not define the applicable standard of proof required by the defendant to sustain his defense; and (3) it unconstitutionally shifts to him the burden of proving the identity of the killer—an element of the crime.

Slightly different alibi instructions have withstood some of the same attacks in *State v. Kubicek*, 81 Wn.2d 497, 502 P.2d 1190 (1972), and *State v. Adams*, 81 Wn.2d 468, 503 P.2d 111 (1972). In those cases the court concluded that an alibi instruction, whether requested by the State or the defendant,[1] should not in the future be included in the charge to the jury unless mandated by the legislature. Despite its conclusions, the court found the giving of the instructions in both *Kubicek*[2] and *Adams*[3] was not reversible error.

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[1]It is not clear whether the instruction was requested by the State, Mr. Johnson or the court. In affidavits filed for this appeal Mr. Johnson's trial counsel states the instruction was requested at both of Mr. Johnson's trials by the State. His first trial resulted in a mistrial. The court reporter in another affidavit said he typed the instruction at the request of the trial judge. We note only defense counsel referred to the instruction during closing argument.

[2]In *Kubicek* the jury was instructed:

"You are instructed that a defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at an identical time the crime was committed, if committed at all. *When the State makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, it is incumbent upon him to go forward with the evidence to sustain his defense of*

In *Adams* the court said the alibi instruction did not violate the defendant's constitutional rights. That court said at page 475:

> We find in this instruction no denial or contravention of such rights. It is a firm and long-established principle in this jurisdiction that an instruction on alibi may be given if supported by the evidence. . . . The instruction now before us appears to have been taken virtually verbatim from *State v. Rosi*, 120 Wash. 514, 515, 208 P. 15 (1922), where it was explicitly approved despite even a wider challenge than it is subjected to now. In that case, this same instruction was sustained on the basis that, by its very language, it did not remove from the state nor reduce in any degree its burden of establishing each element of the crime beyond a reasonable doubt nor subvert the presumption of innocence.

The court then adhered to its decision in *Kubicek*.

Nonetheless, Mr. Johnson has seized upon recent decisions of both the United States and state supreme courts as requiring a result inconsistent with *Adams* and *Kubicek*. Citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508,

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alibi to your satisfaction. It is not incumbent upon him to prove alibi beyond a reasonable doubt; and when the proof is all in, both that given by the State and for the defendant, then the primary question is (the whole evidence being considered) is the defendant guilty beyond a reasonable doubt, the law being that, if, after you have considered all the evidence as well as that touching the alibi as the evidence introduced by the State, you have a reasonable doubt of the guilt of the accused, you should acquit; if you have not, you should convict." (Italics ours.) *State v. Kubicek*, *supra* at 501.

[3]In *Adams* the jury was instructed:

"A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed, if committed at all.

"*When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence, the burden is upon such defendant to make out his defense as to an alibi, but it is not incumbent upon him to prove an alibi beyond a reasonable doubt.* When the proof is all in, both that given by the state and for the defendant, then the primary question is, the whole of the evidence being considered, whether such defendant is guilty beyond a reasonable doubt. The law is that if you have a reasonable doubt of the guilt of the accused, after having considered all the evidence, you should acquit; but if, after considering all the evidence, you do not have a reasonable doubt of the guilt of the accused, you should convict." (Italics ours.) *State v. Adams*, *supra* at 473.

95 S. Ct. 1881 (1965), *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977), and *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976), Mr. Johnson essentially asks that we reexamine *Adams* and *Kubicek* insofar as they hold that an alibi instruction does not unconstitutionally shift to the defendant the burden of proving an element of the offense with which he is charged.

Primary reliance is placed upon *Mullaney* where the court held that a Maine law, requiring the defendant to establish by a preponderance of the evidence that he acted in heat of passion on some provocation in order to reduce a charge of murder to manslaughter, was violative of due process; that, instead, due process "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation . . ." *Mullaney v. Wilbur*, *supra* at 704. There the jury was instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied, resulting in a conviction of murder unless defendant proved by a preponderance that he acted in the heat of passion. Likewise, in *Kroll*, our Supreme Court found unconstitutional an instruction which provided that when a homicide is proven beyond a reasonable doubt, there is a presumption of second-degree murder and that it is incumbent upon the defendant to show the homicide to be manslaughter. Under this instruction the *Kroll* court said at page 840:

> [T]he State is not required to prove every element of second-degree murder; it need only prove beyond a reasonable doubt the killing of one human being by another. No reference is made in the instruction to the fact that second-degree murder statutorily involves the element of intent. If the defendant is to reduce the crime to manslaughter, *however, he has the burden of creating a reasonable doubt as to the absence of intent.* Such a shifting of the burdens of proof clearly violates the concept of due process . . .

(Italics ours.)

Finally, in *Roberts*, the court, in addition to striking an instruction requiring the defendant to prove justification in order to reduce the degree of homicide, held unconstitutional the giving of a self–defense instruction which placed the burden of proving self–defense on the defendant. The self–defense instruction read:

> When a defendant claims that he killed another in self–defense of his own person or property, the burden is upon that defendant to prove that the homicide was done in self–defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof if, from a consideration of all the evidence in the case you have reasonable doubt as to whether or not the killing was done in self–defense.

After discussing *Mullaney* and *Kroll*, *Roberts* said of this instruction:

> *The self–defense instruction presently before us places precisely the same burden upon the defendant as to the element of absence of justification.* In view of the decisions in *Mullaney* and *Kroll*, *it is now only permissible to place upon the defendant the obligation to produce evidence, from whatever source, tending to establish self–defense.* The obligation to prove the absence of self–defense must remain at all times with the prosecution.

(Italics ours.) *State v. Roberts*, *supra* at 345.

[1, 2] We do not find the *Mullaney–Kroll–Roberts* trilogy applicable to the alibi defense or the instruction questioned by Mr. Johnson. While the identity of the defendant and his presence at the scene of the crime must be proven beyond a reasonable doubt, they are different than the elements discussed in *Mullaney* (justification), *Kroll* (intent), and *Roberts* (justification) which were presumed to follow from certain proven facts. In those instances the defendants were forced to negate the presumed facts in order to lessen the degree of the crime or to be acquitted. The identity and presence of the defendant are never presumed nor are they definitional elements of statutorily proscribed offenses.

Thus, we find no need to upset the *Adams-Kubicek* rule in light of later cases.[4]

Nor are we inclined to decide what standard of proof is required of a defendant asserting an alibi defense, as Mr. Johnson requests, because he is not required technically to *prove* his alibi. Instead, his burden really is to *produce* evidence tending to establish that defense and, in effect, to cast a doubt upon the prosecution's case. In the final analysis, the question is whether the evidence establishes beyond a reasonable doubt that the defendant committed the crime. That is the reason for confusion in the area of alibi defense and instructions.

> If the defendant raises an alibi, he is in effect denying the claim of the prosecution that he was at the scene of the crime at the time it was committed. He is neither expressly nor impliedly admitting the averments of the prosecution [as he would in the case of self-defense] and, therefore, need not set forth matter which would avoid the criminal liability that an admission would entail. Instead, by asserting that he was at another place at the time when the alleged crime was committed, the defendant is denying by necessary implication, if not expressly, the allegations set forth in the charge.
>
> . . .
>
> *There is some conflict as to the burden and degree of proof of the defense of alibi. Some of this conflict may undoubtedly be explained by a failure to recognize the distinction between the burden of proof and the burden of going forward with the evidence.* Because the burden of presenting evidence of a fact peculiarly within the

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[4]We note the Supreme Court has arguably retreated from the broad sweeps it made in *Mullaney*. In *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319, 2325 (1977), the court approved a state statute which required a defendant in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter. The court found the affirmative defense did "not serve to negative any facts of the crime which the State is to prove in order to convict for murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; . . ." The court noted that the death, the intent to kill and causation were the only facts the State was required to prove beyond a reasonable doubt in order to convict the defendant of murder under the New York statute.

defendant's knowledge may be placed upon him, it is proper to hold that the defendant must in the first instance go forward with evidence in support of his claim of alibi. *The matter is to a large degree academic because, in spite of variant forms of expression, it is generally held that the ultimate burden of proving the presence of the defendant at the scene of the crime at the time of its commission is upon the prosecution, rather than that the ultimate burden is upon the defendant to show that he was at another place. The defendant may succeed simply by raising a reasonable doubt of his presence at the scene of the crime at the time it was committed.*

(Citations omitted; italics ours.) 1 C. Torcia, *Wharton's Criminal Evidence* § 23, at 36–39 (13th ed. 1972). It is for those reasons that the courts in *Adams* and *Kubicek* directed that no alibi instruction be given. But as in *Adams* and *Kubicek* we find no reversible error in the giving of this instruction.

Judgment of the Superior Court is affirmed.[5]

MUNSON, C.J., and GREEN, J., concur.

Reconsideration denied April 5, 1978.

INSTRUCTION NO. 13

A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.

When the state makesout such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.

After both the state and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, it not, you should convict.

INSTRUCTION NO. 14

The burden is on he State of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt. It is not sufficient that the State should prove these facts by a mere preponderance of the evidence, nor, on the other hand, is it necessary that it should prove them conclusively in such a manner as to leave no room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty.

The expression "reasonable doubt" means in law just what the words imply - a doubt founded on some good reason. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt,

such as an honest, sensible and fairminded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

You must use your common sense as men and women of experience possessing some knowledge of wordly affairs, and if after examining carefully all the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of the guilt of a defendant, then you are satisfied of guilt beyond a reasonable doubt, and you verdict should be guilty as charged. On the other hand, if you do not have such a conviction then you have a reasonable doubt of guilt and your verdict should be not guilty.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON, Plaintiff,	CAUSE NO. 66747
v.	AFFIDAVIT OF DONALD W. SCHACHT
CURTIS LEE JOHNSON, Defendant.	

STATE OF WASHINGTON)
: ss.
COUNTY OF WALLA WALLA)

DONALD W. SCHACHT, being first duly sworn on oath, deposes and says:

That I was the trial attorney in the original trial in Walla Walla County, and one of the trial attorney in the subsequent retrials in Snohomish County; that an alibi instruction was requested by the Prosecuting Attorney in both cases; that I was not aware the Supreme Court had recommended that the alibi instruction not be given after the case of State v. Adams; that I became aware of that after the appeal was filed; that I never intended to

waive any constitutional or other objections to such instructions by not excepting to the same; that had I known there were issues to be taken on the alibi instruction, I would have made an exception to it.

/s/Donald W. Schacht

SUBSCRIBED AND SWORN to before me this ____ day of May, 1977.

/s/Karen R. Berg
Notary Public for State of Washington Resding at Walla Walla.

Office - Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2369

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

CURTIS LEE JOHNSON,

Petitioner,

v.

JAMES SPALDING, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does an instruction which states:

> "A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.
>
> "When the State makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.
>
> "After both the State and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, if not, you should convict."

violate the Fourteenth Amendment Due Process Clause under the standard of *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Engle v. Isaac*, ___ U.S. ___, 102 S.Ct. 887 (1982).

II. Should a district court reviewing a state criminal conviction under 28 U.S.C. § 2254 consider a series of trial errors which do not individually, prejudicially affect a constitutional right, under a cumulative error standard viewing the trial as a whole or only individually and in isolation?

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CURTIS LEE JOHNSON,

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

ARGUMENT

I. CERTIORARI IS INAPPROPRIATE TO REVIEW THE ALIBI JURY INSTRUCTION, BECAUSE THE JURY INSTRUCTION DID NOT SHIFT THE BURDEN OF PROOF TO THE PETITIONER.

Exactly who proposed the alibi jury instruction (jury instruction 13) is unclear. *State v. Johnson*, 19 Wn.App. 200, 574 P.2d 741 (1978), n. 1. The challenged jury instruction is quoted in full in respondents' Questions Presented No. I, *supra*.

An alibi defense is the presentation of evidence in an attempt to refute the state's evidence concerning the

essential element — the defendant's presence. The challenged instruction states the law of the "defense of alibi" as a rule affecting the evidentiary and procedural order of proof. The instruction does not compel the jury to first believe the state's evidence. It does not operate in effect to tell the jury, "before you can acquit the defendant by reason of his defense of alibi, you must first find that he has established it (by some evidentiary measure)." *Stump v. Bennett*, 398 F.2d 111, 119, n. 6 (8th Cir. 1968) *en banc*.

The contested second paragraph of the instruction begins with the placing of the burden of production and persuasion upon the state. The relevant language in the instruction is: "when the state makes out such a case as would sustain a verdict of guilty" (jury instruction 13). The instruction then describes the defendant's presentation as to his theory of the case to refute the state's case. However, the language does not require the jury to believe the prosecutor's theory until it is satisfied with the defendant's theory. The continuing notion that the prosecution must prove the elements is not interrupted by the language of incumbency, requirement, or similar compulsion such that defendant's failure to do as required accrues to the prosecution's benefit. The pertinent language is as follows: "*and the defendant offers* evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned." What verges on a burden in this language draws the jurors' attention to the question of whether the defendant produced sufficient evidence to put the particular fact of his presence in issue but defendant need not do anything — neither produce nor persuade the mind of the jury. Admittedly the instruction may create confusion or ambiguity but that is dispelled immediately in the closing paragraph, which clarifies any ambiguity by restating that the reasonable doubt standard was to be applied to all evidence, thereby, the instruction cured itself of any fault. *Wright v. Smith*, 569 F.2d 1188 (2d Cir. 1978) (curative language, in the instruction, reemphasizing state's burden of proof beyond reasonable doubt, eliminates error).

The sum of the instruction is that even if the jury

should determine that the defendant presented insufficient evidence of alibi or should disbelieve the evidence, the jury must weigh all the evidence submitted and should acquit if there is a reasonable doubt of guilt. Furthermore, the charge requires the state, not the defendant, to meet the reasonable doubt standard to convince the jurors of the defendant's presence and guilt of the crime. The alibi instruction, jury instruction 13, by its language neither shifts the burden of proof nor negates the explicit presumption of innocence charged by jury instruction 11.

The District Court applied the proper standard with regard to petitioner's claim, by looking at all the jury instructions as a whole, and not in isolation, under the standard enunciated in *Cupp v. Naughten*, 414 U.S. 141 (1973). *Johnson v. Spalding*, 510 F.Supp. 164, 167 (1981).

Many of the cases cited by the petitioner on alibi instructions are distinguishable in that the *Naughten* standard was not applied. Several other cases cited by petitioner are inapplicable in that the issue of the alibi instruction was presented to a federal court on direct appeal, rather than in a post-conviction collateral attack, that is, a habeas corpus action. The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of the state court's judgment is even greater than the showing required to show plain error on direct appeal. *Henderson v. Kibbe*, 431 U.S. 145 (1977).

The remainder of petitioner's authorities may be distinguished upon the facts. In the case of *Rogers v. Redman*, 457 F.Supp. 929 (D.C. Del. 1978), the jury instruction[1] in question posed the initial burden of proof

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[1] "Now, it is the defendant's burden to prove to your satisfaction the defense of alibi and the law reads that affirmative defense of alibi is established by a preponderance of the evidence when the jury is persuaded that the evidence makes it more likely than not that each element of the affirmative defense existed at the required time. Therefore, if you are convinced by a preponderance of the evidence that the Defendant, Will E. Rogers, was not present at the scene of the offense at the time they allegedly were committed, then you must return a verdict of not guilty."

upon petitioner Rogers to prove the defense of alibi by a preponderance of the evidence, unlike jury instruction 13, given in petitioner Johnson's trial, which merely required petitioner Johnson to produce evidence after the state had established a case which would sustain a verdict of guilty. *Rogers v. Redman, supra,* is further distinguishable on the grounds that the petitioner in that case properly objected during the course of trial to the alibi instruction, so as to enable the trial judge to correct his error and deliver an accurate charge. No objection was made to jury instruction 13 at petitioner Johnson's trial. It is the rare case in which an improper jury instruction will justify a reversal of a criminal conviction when no objection has been made in the trial court. *Henderson v. Kibbe, supra*; *Wright v. Smith,* 569 F.2d 1188 (2d Cir. 1978).

Petitioner also cites the case of *Graham v. Maryland,* 454 F.Supp. 643 (D. Md. 1978). Aside from being a poorly reasoned decision, in that the court held that the harmless error doctrine was inapplicable to alibi jury instructions, the published opinion in *Graham, id.,* does not even contain a copy of the jury instruction which it held unconstitutional. Thus, it is impossible for this Court to compare jury instruction 13 given in petitioner Johnson's trial with the jury instruction given in petitioner Graham's trial. This Court must not only consider the language used in jury instruction 13, it must consider jury instruction 13 along with all the other jury instructions as a whole. Further, the holding in *Graham, id.,* has been sharply criticized by the Maryland District Court in a later opinion, *Robertson v. Warden, Maryland Penitentiary, Collins,* 466 F.Supp. 262 (D. Md. 1979), *affirmed* 624 F.2d 1095 (4th Cir. 1980), *cert. denied* 101 S.Ct. 376, and the inherent prejudice finding of *Graham* was discredited.

To reiterate, petitioner has argued that the alibi instruction removed the prosecution's burden to produce evidence and persuade the jury as to the essential elements of the crime and place that requirement upon him. To assess this contention, this Court must look at all the instructions as a whole, not an isolated phrase or paragraph. *Cupp v. Naughten, supra.* Jury instruction 9,

as given at petitioner's trial, clearly states that the state must prove beyond a reasonable doubt all the elements of the crime, specifically the state must prove that the defendant "did cut, stab and wound the said Steven James McCoy with a knife;". Moreover, the court also instructed the jury that the defendant was innocent until proven guilty beyond a reasonable doubt, jury instruction 11. In addition, any possible confusion in jury instruction 13 with regard to the burden of the alibi defense was cured by defense counsel in closing argument. Throughout this case, petitioner's main argument has been that the language in jury instruction 13 could have possibly impermissibly confused the jury into believing that defendant had the burden of proof with regard to his alibi defense.

In defense counsel's closing argument, Mr. Schacht, one of petitioner's two defense attorneys, specifically addressed and explained the operation of jury instruction 13, the alibi instruction. (RP p. 8, line 15 through p. 9, line 4.) In his explanation of jury instruction 13, Mr. Schacht twice clarified to the jury that the burden of proof as to guilt *never* shifted to the defense. Mr. Schacht also reemphasized that the state had the burden to prove their case beyond a reasonable doubt.

More specifically, petitioner Johnson's defense counsel explained that the burden shifting language in jury instruction 13 related to the burden of coming forward with evidence, not the burden of proving innocence. When this latter explanation is read in the context of the language contained in jury instruction 13: "When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi * * *," it is clear the burden of coming forward with evidence did not shift to the defendant until the state had proven him guilty beyond a reasonable doubt. In light of this explanation alone, it would be unreasonable for a court to conclude that the jury interpreted jury instruction 13 to shift the burden to the defendant to prove his innocence. In closing argument, petitioner's defense counsel cured any ambiguity which may have been contained in jury instruction 13.

Finally, in the last part of petitioner's defense attorney's closing argument, his counsel drove the point home that:

> "We do not have to prove anything. The state has that burden. It has never shifted. If they have not carried their burden, which I submit to you they have not, then you should return a verdict of not guilty." (RP Closing Argument p. 39, lines 24-28).

The jury at petitioner Johnson's trial never was led to believe that he had the burden to prove his innocence by means of the alibi defense. The jury was repeatedly advised that the burden never shifted to the defendant. Jury instruction 13 did not amount to constitutional error.

The language contained in the second paragraph of jury instruction 13 did not shift the burden of proof with regard to that alibi defense onto the petitioner. The continuing notion that the prosecution must prove the elements is not interrupted by language of incumbency, requirement or similar compulsion such that the defendant's failure to do as required accrues to the prosecutor's benefit.

This issue of an allegedly unconstitutional jury instruction, similar to the one given at petitioner's trial, that shifted the burden of proof as to an alibi defense onto the defendant has been argued in several federal circuit courts of appeal, unsuccessfully. *United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980) (appeal); *United States v. Robinson*, 602 F.2d 760 (6th Cir. 1979) (appeal); *Hunter v. Williams*, 570 F.2d 510 (4th Cir. 1978) (habeas); *Wright v. Smith*, 569 F.2d 1188 (2d Cir. 1978) (habeas).

Any error contained in jury instruction 13, if any existed, was harmless error. Petitioner Johnson was identified by several eyewitnesses as the murderer. While the testimony of other witnesses contradicted this testimony and supported petitioner Johnson's alibi defense, there was substantial evidence to support the verdict of guilty and the jury's decision to convict petitioner was most certainly based upon the fact that they believed the state's witnesses and not petitioner's witnesses. It is not the function of federal habeas corpus

review to second guess the minds and perceptions of the jury at trial.

Both the District Court and the Ninth Circuit Court of Appeals reviewed the entire record in petitioner's case and determined that beyond question, petitioner had a fair trial and there was no real possibility that the jury was actually misled or that petitioner was in any way prejudiced by the alleged errors which he is now seeking to have this Court review.

Because no constitutional error occurred in the giving of the alibi jury instruction, jury instruction 13, this claim does not state grounds for relief in a federal habeas corpus proceeding. 28 U.S.C. § 2254. Accordingly, review by certiorari from this Court is unwarranted.

II. THE DISTRICT COURT GAVE PROPER CONSIDERATION TO PETITIONER'S CLAIMS OF NON-CONSTITUTIONAL ERROR.

Pursuant to 28 U.S.C. § 2254(a), a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.*

Accordingly, only claims of constitutional error are cognizable in a federal habeas corpus proceeding to review a state court conviction.

As noted by the District Court in its published opinion, *Johnson v. Spalding, supra* at 169-170, with regard to challenged jury instructions, jury instructions 13 and 14, the court applied the proper test of examining the jury instructions as a whole. See *Cupp v. Naughten, supra.*

In this case, petitioner alleged numerous trial errors occurred. However, as noted by the District Court, many of these errors did not implicate any constitutional protection. Rather, petitioner attempted to stack these non-constitutional errors so as to allege that a constitutional error occurred.

Judge Quackenbush, however, applied the proper standard of review when he noted:

> "An allegation of error not of constitutional proportion is, for habeas corpus purposes, foreclosed from further consideration except as it constitutes a fact of trial connected to the determination of prejudice after a determined constitutional error."

Thus, the District Court did consider the petitioner's allegations of non-constitutional error, but only in connection to prejudice from a determined constitutional error. As noted by the court, no constitutional error occurred in petitioner's trial. Any number of "almost errors, if not errors cannot constitute error." *Hammond v. United States*, 356 F.2d 931 (9th Cir. 1966).

Under the Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to a fundamentally fair trial, but not a perfect trial. In every trial errors do occur. All trial court errors can be considered on direct appeal. However, only constitutional errors can be considered in a federal court habeas corpus review of a state court conviction. 28 U.S.C. § 2254(a).

In short, as noted in the District Court's opinion, *supra* at 169, non-constitutional errors are not considered as errors in a federal habeas corpus proceeding. Rather, they are considered as facts relating to prejudice with regard to constitutional errors.

Therefore, petitioner's argument that the District Court failed to consider the cumulative impact of non-constitutional errors is a *non sequitur* because by statute only constitutional errors can be considered by a federal habeas corpus court. 28 U.S.C. § 2254(a).

Again, as noted by the Ninth Circuit Court of Appeals, after reviewing the entire trial court record, beyond question Mr. Johnson had a fair trial and we see no real possibility that the jury was actually misled or that Mr. Johnson was in any way prejudiced by the alleged errors raised in this case.

For the foregoing reasons, respondents respectfully request that petitioner's petition for writ of certiorari be denied.

DATED this 24th day of September, 1982.

Respectfully submitted,

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